

IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE	:	CASE NO. 0405017002
	:	
vs.	:	
	:	
OLAN V. FOSKEY	:	
	:	
Defendant.	:	Submitted: December 9, 2005
	:	Decided: June 23, 2006

Eric G. Mooney, Esquire, Attorney for the Defendant.
Carole E.L. Davis, Esquire, Deputy Attorney General for the State of Delaware.

**DECISION ON THE DEFENDANT’S MOTION TO SUPPRESS AND
DECISION AFTER TRIAL**

On October 3, 2005, the Defendant, Olan V. Foskey (“Defendant”) was charged with one violation of 21 *Del. C.* § 4177(a), Driving Under the Influence, and one violation of 21 *Del. C.* § 4165, Failure to Yield Right of Way. The Court conducted a bench trial with respect to the above charges on November 29, 2005. As a pretrial matter, the Court heard the Defendant’s motion to suppress and the parties stipulated that the evidence presented in the hearing would also be considered for trial purposes. At the conclusion of the evidence, the Court reserved decision and afforded the parties 10 days to brief their arguments on the Defendant’s motion. After hearing oral arguments and reviewing counsels’ submissions, the Court finds and determines as follows.

FACTS

Corporal Elwood (“Officer”) was dispatched to the scene of an automobile accident, which occurred on CR 454 approximately three miles east of Delmar, Delaware, at 7:57 p.m. on May 11, 2004. The Officer arrived at the scene at 8:17 p.m. Upon arrival, he observed that the two vehicles involved in the accident were

significantly damaged. When the Officer arrived, the Defendant had either been extracted, or was in the process of being extracted from his vehicle. After being extracted, the Defendant was treated by medical personnel at the scene. Because the Defendant suffered significant injury from the accident, the Officer did not speak with him at the scene. However, the Officer was able to speak with the driver of the other vehicle, Mr. Elliot, who stated that the accident occurred at 7:55 p.m. when the Defendant pulled his vehicle out of a private drive into Mr. Elliot's path of travel. Mr. Elliot also told the Officer that he did not have time to avoid the collision. Mr. Elliot did not appear before this Court and his hearsay statements to the Officer are considered for evidentiary purposes, only to determine whether probable cause existed for the arrest.

The emergency medical personnel informed the Officer that they would be taking the Defendant to Peninsula Regional Medical Center ("PRMC") in Salisbury, Maryland for treatment, because it was the closest hospital and the Defendant required immediate medical attention. The Officer acquiesced to the transfer and stayed at the scene to further investigate the accident.

Upon conducting his investigation, the officer identified an odor of alcohol coming from the Defendant's vehicle. He did not find any canisters or bottles that contained alcoholic beverages in the vehicle. After the Officer completed his investigation at the scene he reported to PRMC, where the Defendant had been taken for treatment.

The Officer testified that he entered the Defendant's treatment room and sat with the Defendant at PRMC, while the Defendant continued to be treated, for one half hour. During that period, the Officer asked the Defendant questions relating to the accident, including, whether the Defendant had been drinking. The Defendant admitted to having three beers but did not specify when he drank. The Officer never read the Defendant his *Miranda* rights. It was during this time period that the Officer observed that the Defendant had blood on his face, bloodshot eyes, and he detected an odor of alcohol on the Defendant's breath. The

Officer did not ask the Defendant to perform field tests due to the severe injuries that he sustained from the accident. At the conclusion of the half hour interrogation, the Officer directed a nurse at the hospital to draw blood from the Defendant for purposes of performing a blood alcohol test. The Officer issued a summons to the Defendant at the hospital, after the blood sample had been taken. Thereafter, the Defendant was airlifted to another hospital for further treatment of his injuries.

DISCUSSION

On a motion to suppress, the State bears the burden of establishing that the police conduct at issue comported with the Defendant's constitutional and statutory rights by a preponderance of the evidence. *Kang v. State*, 2001 WL 1729126 (Del. Super.) (citing *Hunter v. State*, 783 A.2d 558, 560 (Del. 2001)). The Defendant argues that his admission of consuming alcohol should be suppressed from evidence at trial because the Officer failed to inform him of his *Miranda* rights. Additionally, the Defendant contends that the blood test is inadmissible because the State failed to establish that the blood draw occurred within four hours after the Defendant was driving. The Defendant also submits that his arrest was illegal because it was not supported by probable cause. The Court will address each issue in the order presented.

Miranda Warnings

The Defendant's admission that he drank three beers at a friend's house on the evening of the accident is not admissible, nor can it be a basis for the arrest that occurred thereafter. I concur with the Defendant that the admission is inadmissible because it was procured as the result of a custodial interrogation without the administration of *Miranda* warnings.

The prosecution may not admit a defendant's statements that were made as a result of a custodial interrogation, unless it can show that the officers administered necessary *Miranda* warnings prior to questioning the defendant. *Hammond v. State*, 569 A.2d 81, 93 (Del. 1990)(citing *Miranda v. Arizona*, 384

U.S. 436, 444 (1996). The procedural safeguards set forth in *Miranda* are only necessary when the interrogation occurs in a custodial setting. *Mathis v. U.S.*, 391 U.S. 1 (1968). Thus, if it is determined that a person was not in custody when he was questioned, *Miranda* warnings are not necessary. *State v. DeJesus*, 1992 WL 354179, *2 (Del. Super.).

Custodial interrogation occurs when law enforcement authorities initiate questioning after the person has been taken into custody or he has otherwise been deprived of freedom in a significant way. *Miranda* at 444. Delaware has adopted a reasonable person standard for determining whether a person is deprived of freedom in a significant way for purposes of custodial interrogation. *Marine v. State*, 607 A.2d 1185, 1193 (Del. 1992). Thus, the test is whether an objective, reasonable person under the totality of the circumstances surrounding the interrogation, would conclude that he was not free to leave. *Id.* Interrogation has been defined as "express questioning or its functional equivalent" on the part of the police, which the police should know is "reasonably likely to elicit an incriminating remark." *Rhode Island v. Innis*, 446 U.S. 291, 300-301 (1980).

The Delaware Supreme Court has considered whether an individual is in custody for *Miranda* purposes when an officer questions that individual in a hospital setting. *Hammond* at 94. The *Hammond* Court opined that there is no black-line "hospital rule" *per se*; the custodial nature of the interrogation is dependent upon the facts and circumstances of each case. *Id.* The facts in *Hammond* reflect that the defendant was taken to a hospital for treatment of injuries as a result of a vehicle accident. *Id.* at 93. The other two passengers were also taken to the hospital, but died as a result of their injuries. *Id.* In an attempt to correctly identify the deceased passengers, the officer questioned the defendant regarding their names. *Id.* The Court found that the defendant was not in custody at the time that the officer questioned him because he was in the hospital as a result of his medical condition only, and not as a result of any police action. *Id.* at 94. Additionally, the Court found that the defendant had no reason to believe that

his freedom of action or movement was restricted when the officer spoke with him after he had been treated for relatively mild injuries. Finally, the Court concluded that the officer's questions were brief and limited to the identity of the deceased passengers, which it determined was more in the vein of a routine, on-scene investigation by the police. *Id.*

The *Hammond* rationale is relevant to the case at hand. However, I find that application of that rationale to the facts and circumstances of this case render a different conclusion. The evidence shows that the Defendant was severely injured and confined to a hospital bed, as a result of those injuries and the treatment being rendered to him, throughout the duration of the interrogation. The Officer had no reason to restrain the Defendant further because his injuries prevented him from moving. The Officer had the ability to freely enter and remain at the Defendant's bedside, during treatment in the ER. Additionally, unlike the officer in *Hammond*, who testified that Mr. Hammond was free to decline to speak with the officer or to leave the hospital, Corporal Elwood stated that even if the Defendant were able to move during the questioning, he was not free to leave the hospital. The officer stated that the Defendant was not free to go and was being detained for a DUI investigation at the time of questioning. Also, the Officer testified that he sat with the Defendant and asked him questions for a relatively lengthy period of thirty minutes.

The length of time between questioning and formal arrest is also relevant in determining whether a defendant was in custody for *Miranda* purposes. *State v. Brotman*, 1991 WL 138421, *5 (Del. Super.)(citing the importance of the fact that after the police questioned the defendant at the hospital, they did not arrest him, nor contact him for an additional 20 days). Corporal Elwood testified that immediately after he finished questioning the Defendant, he ordered a blood test and issued a summons for his arrest. Accordingly, formal arrest occurred soon after the Officer questioned the Defendant, which indicates that the Defendant was in custody when he was questioned.

It has been held that a defendant is not in custody for *Miranda* purposes when it is solely his physical injuries that prevent him from leaving the hospital, and the defendant is not otherwise placed in a position in which a reasonable person would have inferred that he was not free to decline to answer the police officer. *DeJesus* at *3(holding that a reasonable person in the defendant's position would deduce that they were able to leave or demand that the officers cease questioning him when the officers asked general questions about what happened at the scene of the crime). However, as discussed *supra*, in addition to his physical condition, the Defendant in this case endured a thirty-minute period of questioning, wherein the Officer asked whether he had been drinking, and he was arrested shortly thereafter. For the foregoing reasons, I find that a reasonable person in the Defendant's circumstances would conclude that he was not free to leave the hospital when the Officer questioned him. Thus, the Defendant was in custody for *Miranda* purposes at that time.

I am also satisfied that the Officer's questioning constituted interrogation because the Officer expressly asked the Defendant whether he had been drinking on the night of the accident and he should have known that such a question was reasonably likely to elicit an incriminating remark. Accordingly, the Court finds that the Officer conducted a custodial interrogation without administering necessary *Miranda* warnings. Therefore, the admission must be suppressed.

The Blood Draw

The State seeks to admit the result of the Defendant's blood draw to prove that the Defendant violated 21 *Del. C.* § 4177(a). Section (a) provides five subsections under which the Defendant could be guilty of driving under the influence. Due to the facts presented by the State it is apparent that the State wishes to submit the test results in order to establish a violation of § 4177(a)(5). Pursuant to that subsection, the State must establish the following elements beyond a reasonable doubt: (1) the Defendant was driving; (2) with a blood alcohol concentration of .08 or more within four hours after the time of driving;

(3) based on alcohol that was present in, or consumed by the defendant at the time that he was driving.

The Court may only admit the test if it finds that the State foundationally established that the blood draw was taken within four hours of the time that the Defendant was driving. *Fiori v. State*, 2004 WL 1284205, *2 (Del. Super.). Because the foundation is an element of the offense, the State has the burden of establishing the four-hour-foundation beyond a reasonable doubt. *Id.* The Court may consider direct or circumstantial evidence to determine whether the State has established the foundation. *Id.*

The test report indicates that the Defendant's blood was drawn at 11:25pm on the night of the accident. To establish the proper foundation, the State had the burden of proving that the Defendant was last driving no earlier than 7:25pm. The State introduced Mr. Elliot's hearsay statement to the Officer as to the time of the accident. However, because the foundation is also an element of the offense itself, the Court may not consider the hearsay statement as proof that Defendant's blood was drawn within four hours of his driving. The Officer also testified that he could tell that the accident occurred relatively soon before he arrived on the scene at 8:17pm because he observed fluids leaking from the vehicle. The evidence also showed that an emergency medical crew had arrived at the scene, and extracted the Defendant or commenced extraction before the Officer arrived. The Officer was unsure if the Defendant was in or out of the vehicle when he arrived. After reviewing his prior testimony the Officer recalled that upon his arrival it took the EMT's approximately fifteen to twenty minutes to extract the Defendant from the vehicle. Without more in the way of direct or circumstantial evidence to establish when the Defendant was last driving before the blood draw, the Court is not convinced beyond a reasonable doubt that the State satisfied its burden of establishing that the Defendant was driving a vehicle within four hours before the blood draw. Therefore, the test is inadmissible.

Probable Cause to Arrest

The law requires that all arrests be supported by a foundation of probable cause that the defendant committed a crime. *Garner v. State*, 314 A.2d 908 (Del. 1973). The Defendant contends that the Officer did not have probable cause to arrest him for DUI. Thus, the Court's determination as to whether the arrest was proper requires a two-fold analysis. First, the Court must consider when the Defendant was arrested. Second, the Court must decide whether the Officer had probable cause to arrest the Defendant at that time.

Although the report indicates that the Defendant was arrested three minutes after the Officer arrived at the scene, the Officer testified that he arrested the Defendant when he issued a summons to the Defendant, which occurred promptly after he directed hospital personnel to draw the Defendant's blood. The State argues that the Defendant was never arrested because the Officer did not physically restrain him. I disagree and find that as a matter of law, the arrest took place, at the latest, when the summons was issued. *See 21 Del. C. § 703(b)(c)*, which classifies a person receiving a summons for a Title 21 offense as a "person arrested." Thus, according to the evidence presented to the Court, the arrest took place after the blood draw occurred. Consequently, the Court's probable cause analysis hinges on whether the Officer had probable cause to believe that the Defendant had committed a DUI violation when he directed the Defendant to submit to a blood test for purposes of obtaining his blood alcohol level.

Although probable cause is often an elusive concept the Delaware Supreme Court has determined that an officer has probable cause to believe that a defendant has committed a violation of 21 *Del. C. § 4177* when, under the totality of the circumstances, the 'officer possesses information which would warrant a reasonable man in believing that [such] a crime has been committed.' *State v. Maxwell*, 624 A.2d 926, 929-930 (Del. 1993)(quoting *Clendaniel v. Voshell*, 562 A.2d 1167, 1170 (Del. 1989). After considering the evidence presented I find that

the observable facts known by the Officer at the time of arrest warranted his reasonable belief that the Defendant had committed a violation of the DUI statute.

Prior to issuing the summons and arresting the Defendant, the Officer procured the following information; first, according to the witness at the scene, the Defendant drove erratically when he pulled out into oncoming traffic and caused an accident. Second, an odor of alcohol could be detected coming from the Defendant's vehicle at the scene of the accident. Third, the Defendant had bloodshot eyes. Finally, that the Officer could detect an odor of alcohol coming from the Defendant at the hospital. The State also alleges that the Defendant's admission of drinking should be considered for probable cause analysis; however, as discussed *supra*, such evidence was collected in violation of *Miranda*, and may not be considered for the purpose of establishing probable cause. In light of the totality of the circumstances, the Court finds that these four factors were sufficient to warrant probable cause. *See Bease v. State*, 884 A.2d 495, 498 (Del. 2005)(holding that erratic driving, odor of alcohol, glassy, bloodshot eyes and admission to consuming beer or chardonnay were sufficient to warrant probable cause); *State v. Maxwell*, 629 A.2d 926, 931 (Del. 1993)(opining that odor of alcohol, presence of beer cans and admission were also sufficient); *Perrera v. State*, 852 A.2d 908, 2004 WL 1535815 (Del.)(finding that a traffic violation, glassy, bloodshot eyes, odor of alcohol, presence of beer cans in vehicle and three failed field tests were sufficient to establish probable cause); and *Higgins v. Shahan*, 1995 WL 108599 (Del. Super. 1999)(opining that accident, glassy, bloodshot eyes, odor of alcohol, admission of consumption and refusal to perform field tests were also sufficient).

For the foregoing reasons, the Court concludes that the four factors observed by the Officer were sufficient to establish probable cause that the Defendant was operating his motor vehicle in violation of 21 *Del. C.* § 4177. Therefore, the Officer legally and properly arrested the Defendant when he issued him a summons.

CONCLUSION

For the foregoing reasons, I find that the Defendant's admission was illegally obtained. Therefore, the Defendant's motion to suppress the admission is hereby GRANTED.

Additionally, I find that the State failed to establish that the Defendant was driving within four hours of the time that his blood was drawn for purposes of establishing his blood alcohol concentration. Accordingly, the Defendant's motion to suppress the test results is hereby GRANTED.

The Officer had probable cause to arrest the Defendant. Therefore, the arrest was legal and the Defendant's motion to suppress the arrest is hereby DENIED.

DECISION AFTER TRIAL

In light of the evidence which has been suppressed, the Court finds that the State has failed to prove that the Defendant committed a violation of 21 *Del. C.* § 4177 beyond a reasonable doubt. While the odor of alcohol, bloodshot eyes and erratic driving were just sufficient to establish Probable Cause, these facts alone are not sufficient to prove guilt beyond a reasonable doubt. Therefore, I find the Defendant NOT GUILTY of committing a violation of 21 *Del. C.* § 4177.

Although the Court considered hearsay evidence for purposes of the suppression hearing, the Court is unable to regard the statements of Mr. Elliot to the Officer regarding the circumstances of the accident for trial purposes. Accordingly, the State failed to produce any admissible evidence that the Defendant committed a violation of 21 *Del. C.* § 4165. Therefore, I find that the State has not satisfied its burden and I find the Defendant NOT GUILTY of committing a violation of 21 *Del. C.* § 4165.

IT IS SO ORDERED, this ____ day of June 2006.

The Honorable Rosemary Betts Beauregard

